IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 754 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKORE JAVANJI THAKHAJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 754 of 1993

MR AM PAREKH for Petitioner No. 1

MR SV RAJU for Petitioner No. 1

MR KP RAVAL APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 28/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused Thakore Javanji Thakaji has challenged in this appeal the impugned judgment and order of conviction and sentence dated 3.5.1993 passed by the learned Addl. Sessions Judge, Mehsana in Sessions Case No.64/93 convicting the appellant-accused for the offence under Section 302 of IPC for committing murder of deceased-Thakore Kachraji Bhatiji on 3.12.1992 at 6.30 p.m. on the kacha road going from Vishalpur to Mokasna of village Kadi and sentenced him to suffer life imprisonment. He has also been convicted for the offence under Section 135 of the B.P.Act, but no separate sentence is awarded.

#. Complainant-Juhaji Kachraji son of deceased Thakore Kachraji lodged complaint on 4.12.1992 at about 7.00 a.m. before police station stating that on the previous day evening i.e. on 3.12.1992 at about 6.30 to 7.000 p.m. when he along with his deceased father were going in camel cart on the Kacha road of Mokasna. At that time he was going ahead of his father. From the noise he could make out that accused-Thakore Javanji was following them with an axe. Javanji was telling his father to pay the cost of Rs.10,000/= for the case which he filed against him. Thereupon, he turned around and simply suggested his father by doing gesture not to speak. Javanji gave kuhadi blow with blunt portion on the head of his father and ran away. He raised shouts run run Javanji gave blow with axe to his father and Javanji ran towards Mokasna. On hearing his shouts four persons; (1) Thakore Shambubhai Prathanji, (2) Halaji Nathaji, (3) Babuji Pradhanji and (4) Ramtuji came there. He went towards his father. He was bleeding injury and the `pagdi' put on by him was full of blood. He tied `falia' on the head of his father where he received injury. All the four aforesaid persons came there and he brought his father in camel card. Except the aforesaid four persons, nobody was there. They took his father at his home. He was made to lie in cot. He was given primary treatment. Thereafter deceased-father told them to allow him to take rest as he was feeling well, therefore, they allowed his father to sleep. He went to sleep at about 11.00 p.m. In the mid night hours at 3.00 a.m. when he woke up for giving water to his father he found his father dead. Thereafter early in the morning at about 5.30 to 6.00 a.m. he went to village Kadi and lodged complaint.

#. After registering the FIR, the police filed charge sheet against the accused and ultimately he was tried for

the offence under Section 302 of IPC as well as Section 135 of B.P.Act before the court of learned Additional Sessions Judge, Mehsana. The prosecution examined complainant-Juhaji Kachraji PW-1 Ex.23 as eye witness and in addition to that the prosecution examined (1) Babuji Pradhanji PW-3 Ex.26, (2) Ramtuji Lalaji PW-4 Ex.27, (3) Shambhuji Thakore PW-5 Ex.28 and (4) Thakore Halaji PW-6 Ex.29 were examined, who went there immediately on hearing shouts from Juhaji at the place of incident. Dr.Balchandra PW-2 Ex.24 and P.I., Mr.Chhaguji Rajput PW-11 Ex.39 examined as I.O. Babuji Prathamji Thakore Ex.26 and Ramtuji Lalji Thakore Ex.27 and Thakore Halaji Nathaji Ex.29 have turned hostile. The evidence of Sambhuji Pradhanji Ex.28 is of not much assistance to the prosecution. The entire prosecution case rest on the sole testimony of Juhaji Kachraji, who had actually seen the incident. He, being the son of deceased, his presence at the place of incident was natural, therefore, learned counsel Shri Parekh frankly conceded that the incident in question must have taken place but his submission was that the prosecution has not narrated the real version and kept back material aspect of the case from the court. His only attempt was that if the injury was so serious then they could have immediately shifted deceased to the hospital or at least they could have taken him to the doctor for immediate treatment. Instead of that they opted for some home made treatment and that is how the deceased succumbed to the injury in the late night. He also submitted that some altercation must have taken place between the deceased and the accused and all of a sudden accused must have given blow with axe and that too not with sharp side of it but he used blunt portion of it and, therefore, he ran away, therefore he submitted that it would be a case at the most under Section 304 Part-I of IPC and not under Section 302 of IPC. From the jail record of the appellant-accused produced by learned APP Shri Raval which is ordered to be taken on record it appears that the appellant has also undergone actual sentence of more than 8 years 2 months and he is entitled for set off for a period of six months and remission of two years. Thus, in all he has already undergone sentence of more than 10 years 7 months. He, therefore, submitted that if this court comes to the conclusion that the appellant-accused has committed offence under Section 304 Part-I of IPC then sentence of more than 10 years would be a sufficient sentence, therefore, order of sentence as already undergone be passed.

#. However, learned APP, Shri Raval for the respondent State submitted that though it was a case of one blow the

appellant-accused selected vital part of the body i.e. head and gave blow with full force with a deadly weapon like axe, therefore, the learned Judge has rightly convicted the accused for the offence under Section 302 of IPC and this court should not interfere with such order of conviction. However, he also submitted that if this court comes to the conclusion that the accused has committed offence under Section 304 Part-I of IPC and not under Section 302 of IPC then the sentence of more than 10 years which he has already undergone be treated as sufficient and the order of sentence as already undergone may be passed.

#. We have carefully considered the evidence of sole eye witness Juhaji Kachraji. From his evidence it is clear that the deceased-Kachraji died due to injury received by him with an axe on the day of incident and the author of the injury was none else but the appellant. However, we are not prepared to believe the version of Juhaji Kachraji on the point that simply on the demand of money made by the appellant-accused from his father and without uttering any word the appellant-accused gave axe blow on the head of his father and ran away. Admittedly, the incident took place at about 6.30 to 7.00 p.m. on 3.12.1992. In December, days are short and by 7.00 p.m. it is bound to be dark. It was kacha road near the village. As per the evidence of Juhaji there was a distance of about 50 feet between him and his deceased father. Some altercation must have taken place on the demand of money made by the appellant-accused from deceased and on the heat of movement if the accused had given only one blow then in our considered opinion it would not be a case under Section 302 of IPC but it would be a case under Section 304 Part-I of IPC. Under the circumstances, the impugned judgment and order of conviction and sentence passed by the learned Trial Judge convicting the appellant-accused under Section 302 of IPC requires to be altered.

#. Accordingly, this appeal is partly allowed and order of conviction passed by the learned Judge convicting the appellant-accused-Thakore Javanji Thakhaji under Section 302 of IPC is modified into offence under Section 304 Part-I of IPC. Accordingly, the appellant-accused is convicted for the offence under Section 304 Part-I of IPC. The appellant-accused has in all undergone sentence of more than 10 years and 7 months, therefore, the sentence as already undergone would be more than sufficient. Accordingly, the order of sentence as already undergone is passed and if the appellant-accused is not required for any other offence, he may be set at

liberty forthwith.

(B.J.Shethna, J.)

(D.P.Buch, J.)

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